UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TYRONE WASHINGTON, Plaintiff, v. OFFICER JIM NGO, et al., Defendants.	)	Case No. C04-1581-RSM REPORT AND RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

Plaintiff is proceeding *pro se* and *in forma pauperis* in this 42 U.S.C. § 1983 civil rights action. Plaintiff alleges, among other things, that officers at the King County Correctional Facility violated his civil rights by directing racial slurs at him and retaliating against him when he used the prison grievance system.[1] The defendant correctional officers have denied they violated plaintiff's civil rights and have moved for summary judgment against him. Plaintiff opposes defendants' motion for summary judgment and has moved the Court for appointment of counsel. Having carefully reviewed the parties' pleadings, supporting materials, and the available record, the Court recommends that defendants' motion for summary judgment, Dkt. No. 31, be GRANTED and that plaintiff's action be dismissed with prejudice.

[1]Plaintiff originally brought suit against the King County Regional Justice Center as well, but the Court dismissed it as an improper defendant. Dkt. No. 23.

FACTS AND PROCEDURAL HISTORY

Plaintiff is a prisoner who is currently incarcerated at the McNeil Island Correctional Center in Steilacoom, Washington. Dkt. No. 30. This litigation, however, surrounds events that allegedly occurred while plaintiff was an inmate at the King County Regional Justice Center ("RJC") in Kent, Washington, in late June and early July of 2004. Dkt. No. 34.

Plaintiff alleges that while he was an inmate at RJC, Correctional Officer Jim Ngo accosted him during dinner and ordered him to "rack back" for two hours without justification.[2] Dkt. Nos. 11, 12. He alleges that Officer Ngo stated to him that "all you niggas are just alike" and then ordered him to serve an additional four-hour "rack back" without justification. Dkt. No. 12. Plaintiff also alleges that Sergeant Michael Jones violated his civil rights by denying the grievance plaintiff filed against Officer Ngo and separately by sending him to solitary confinement. Dkt. Nos. 11, 12. Finally, plaintiff argues that Captain Woodbury violated his civil rights by failing to find merit in his grievance against Officer Ngo. Dkt. No. 11.

In response, defendants have filed a motion for summary judgment and dismissal. Dkt. No. 31. Defendants argue that the case should be dismissed as to Sergeant Jones and Captain Woodbury because plaintiff has failed to plead facts which show that either of them violated plaintiff's constitutional rights. *Id.* Further, Officer Ngo has no recollection of directing any racial slur towards defendant and argues that, even if he had, such language did not violate plaintiff's civil rights. Dkt. No. 32. Officers Ngo and Jones also assert the"rack back" orders were appropriate responses to control plaintiff's disruptive behavior and that the order for segregation was in response to a separate violation for tampering with a commissary vending machine and theft. Dkt. Nos. 31, 32.

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[2]A "rack back" is an inmate management technique that requires inmates to return to their cells. It does not involve physical discipline, does not impact the inmate's housing situation, nor does it result in any loss of "good time." Dkt. No. 34.

DISCUSSION

In order to state a claim for relief under 42 U.S.C. § 1983, a plaintiff must assert that he suffered a violation of rights protected by the Constitution or created by federal statute, and that the violation was proximately caused by a person acting under color of state or federal law. *See Crumpton v. Gates,* 947 F.2d 1418, 1420 (9th Cir. 1991); *see also WMX Technologies, Inc. v. Miller*, 197 F.3d 367, 372 (9th Cir. 1999) (en banc). Section 1983 liability arises only upon a showing that defendants personally participated in violating plaintiff's civil rights. *Respondeat superior* liability will not support § 1983 liability unless plaintiff demonstrates that a supervisor participated in the violations, directed the violations, or knew about the violations and did nothing to prevent them. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (internal citation omitted); *see also Mabe v. San Bernardino County,* 237 F.3d 1101, 1109 (9th Cir. 2001).

A. Plaintiff's claim relating to denial of his grievance against Captain Woodbury and Sergeant Jones must be dismissed.

Federal Rule of Civil Procedure 12(b)(6) permits dismissal of an action for "failure to state a claim on which relief can be granted[.]" Fed. R. Civ. P. 12(b)(6). A court faced with such a motion must accept all facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff. *Karam v. City of Burbank,* 352 F.3d 1188, 1192 (9th Cir. 2003). The Court, however, is not required to accept legal conclusions cast in the form of factual allegations when it is unreasonable to draw those conclusions from the facts alleged. *Clegg v. Cult Awareness Network,* 18 F.3d 752, 754-55 (9th Cir. 1994). "Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors,* 266 F.3d 979, 988 (9th Cir. 2001). These rules apply to civil rights complaints brought by *pro se* plaintiffs, although pleadings are held to a less stringent standard than formal pleadings drafted by lawyers. *See, Haines v. Kerner*, 404 U.S. 519, 520 (1972); *see also Gillespie v. Caviled*, 629 F.2d 633, 640

(9th Cir. 1980).

In this case, defendants' motion to dismiss plaintiff's claims relating to the denial of his grievances should be granted. Plaintiff's complaint fails to allege that Captain Woodbury personally participated in violating his civil rights, nor that he in any way directed the alleged violation of his rights. Similarly, plaintiff does not allege that Captain Woodbury knew about the alleged violations and did nothing to correct them. Instead, plaintiff essentially alleges that Captain Woodbury and Sergeant Jones allowed Officer Ngo to violate his rights by denying the grievance he filed against Officer Ngo. This Court is unaware of any authority, and none has been provided by plaintiff, that imposes § 1983 liability on a prison officer solely because the prison officer disagrees with a prisoner's administrative grievance.

B. Defendants' motion for summary judgment regarding alleged use of a racial slur by Officer Ngo must be dismissed.

Generally, verbal harassment and threats do not state a claim under 42 U.S.C. § 1983. *Gaut v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987). Even the use of racial slurs to harass prisoners, without more, does not rise to the level of a constitutional violation. *See Hoptowit v. Ray*, 682 F.2d 1237, 1252 (9th Cir. 1982).

Here, plaintiff alleges that Officer Ngo stated to him that "all you niggas are just alike." Dkt. No. 12. No prison records or any other evidence available to the Court support plaintiff's allegation. Dkt. No. 34. Officer Ngo denies directing any such racial slur towards plaintiff. Dkt. No. 32. Similarly, Officer K. Terry, who witnessed the incident, did not recall hearing Officer Ngo use any racial slur, including the term "nigga." Dkt. No. 35. Nevertheless, the plaintiff is certain that it occurred. Assuming a set of facts most favorable to the plaintiff — e.g., that the slur was used — such allegations do not state a claim for violation of a prisoner's civil rights under § 1983. As a result, this claim must be dismissed as a matter of law.

C. Defendants' motion for summary judgment on the "rack back" charge and the segregation charge must be granted on the grounds of qualified immunity.

The plaintiff also asserts that he has been the subject of "rack backing" and segregation in retaliation for filing a grievance. Dkt. Nos. 11, 12. As to these issues, the defendants are entitled to dismissal on the grounds of qualified immunity.

Public officials who perform discretionary functions enjoy qualified immunity in a civil action for damages, provided that his or her conduct does not violate clearly established federal statutory or constitutional rights which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).[3] Qualified immunity is "immunity from suit rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

To determine whether an official is entitled to qualified immunity, the Court must conduct a two step analysis. First, it must determine whether the facts alleged, when taken in a light most favorable to the plaintiff, demonstrate that the defendant's conduct violated a constitutional right. *Saucier v. Katz,* 533 U.S. 194, 201 (2001); *Cruz v. Kauai County*, 279 F.3d 1064, 1068 (9th Cir. 2002). If the plaintiff's pleadings could be found to allege a violation of a constitutional right, the Court must determine whether the right was "clearly established" at the time of the alleged violation. *Saucier,* 533 U.S. at 201; *Cruz*, 279 F.3d at 1069.

1. <u>If taken as true, plaintiff's complaint shows defendants' conduct could have violated his constitutional right to remain free from retaliation.</u>

The first prong of the qualified-immunity analysis requires the Court to determine whether the facts alleged, when taken in a light most favorable to the plaintiff, demonstrate that the defendant's conduct violated a constitutional right. *Saucier,* 533 U.S. at 201; *Cruz*, 279

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[3]Plaintiff's request for injunctive relief must be dismissed, due to mootness. He has no live, cognizable interest in preventing officers from engaging in the behavior complained of now that he resides in a different facility. *See Public Utilities Comm'n v. FERC,* 100 F.3d 1451, 1458 (9th Cir. 1996). Further, plaintiff has no standing to seek injunctive relief due to lack of imminence. Past injury is not enough to merit prospective injunctive relief. *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992).

F.3d at 1068. This inquiry mirrors the Court's substantive analysis of a motion for summary judgment. *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002) (as amended).

Here, plaintiff's complaint satisfies the first prong of the qualified-immunity analysis. The Ninth Circuit has repeatedly recognized that the First and Eighth Amendments and the Due Process Clause protect a prisoner's right to file grievances without being retaliated against by prison officials. *Austin v. Terhune*, 367 F.3d 1167, 1170-71 (9th Cir. 2004); *Hines v. Gomez*, 108 F.3d 265, 269 (9th Cir. 1997); *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995); *Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985). Taken in a light most favorable to plaintiff, he has described facts which allege that prison officials sent him to solitary confinement and ordered him to "rack back" in retaliation for bringing administrative grievances. Dkt. Nos. 11, 12. Additionally, he has identified the Due Process Clause as a source of protecting that right. Defendants appear to concede this issue. Dkt. No. 31.

2. Plaintiff's complaint fails to show prison officials' conduct violated a clearly established constitutional right.

Having found that plaintiff has adequately alleged a violation of his constitutional rights, the Court must then determine whether the right was "clearly established," that is, whether defendants violated that clearly established right. *Saucier*, 533 U.S. at 201. A right is "clearly established" if its contours are sufficiently clear for a reasonable official to understand that his or her actions would violate that right.[4] *Id.* at 202 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Because it is often difficult for officials to determine whether their conduct is consistent with the law, the dispositive inquiry is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* Thus, an official who makes a mistake in applying the relevant legal doctrine may still receive qualified

[4]The Court must turn first to controlling authority in this Circuit or from the Supreme Court of the United States. *Sorrels*, 290 F.3d at 970. If no controlling authority exists, the Court should next turn to decisions of "sister Circuits, district courts, and state courts." *Id.* (internal citations omitted).

immunity if his or her mistake was reasonable. *Kennedy v. City of Ridgefield*, 411 F.3d 1134, 1141-42 (9th Cir. 2005). Plaintiff bears the burden of showing that the right in question was clearly established under this second prong. *Sorrels*, 290 F.3d at 969.

In order to state a claim for retaliation, plaintiff must assert that the allegedly retaliatory action failed to advance legitimate correctional goals or that it was not narrowly tailored to meet such goals. *Pratt*, 65 F.3d at 806; *Hines*, 108 F.3d 265, 266 (9th Cir. 1997). Plaintiff bears the burden of proving the absence of legitimate correctional goals. *Pratt,* 65 F.3d. at 806 (internal citations omitted). Prison guards have a legitimate interest in maintaining internal order and discipline in a prison. *See Rizzo v. Dawson*, 778 F.2d 527, 532 (9th Cir. 1985). Moreover, courts afford significant deference to prison officials' discretion to manage their prisons because of their experience and expertise in doing so. *Bell v. Wolfish*, 441 U.S. 520, 548 (1979); *Michenfelder v. Sumner*, 860 F.2d 328, 331 (9th Cir. 1988).

Here, a reasonable prison official could have believed that ordering a "rack back" lawfully advanced a legitimate penalogical interest. Plaintiff and his cell mate had been disruptive during mealtime by making excessive noise, acting aggressively, and mocking Officer Ngo. Dkt. Nos. 32, 35. In order to control the situation and prevent any escalation, Officer Ngo ordered plaintiff and his cell mate to "rack back." Dkt. No. 32. Plaintiff, however, resisted Officer Ngo's order. Dkt. Nos. 32, 35. In response to plaintiff's behavior, he ordered plaintiff to "rack back" for an additional four hours over the course of the following day. Dkt. No. 32. Ordering plaintiff to "rack back" in these circumstances was a reasonable tactic narrowly designed to ensure order and discipline in the prison. Therefore, qualified immunity is appropriate as to this claim. As discussed above, a "rack back" order simply requires the inmate to return to his cell.

Similarly, the transfer of plaintiff to protective custody, which had the effect of segregating him from other inmates and placed restrictions on leaving his cell, was narrowly tailored to advance a legitimate penalogical interest. The total amount of time that the plaintiff

spent in protective custody is not entirely clear from the record, but it appears that it may have been for as long as ten days. Dkt No. 38, p. 5. Plaintiff tampered with a vending machine and was accused of taking candy from the machine. This meant that other inmates would have to pay more for candy, or go without, because plaintiff took the candy from the closest distribution slot in the vending machine. This action angered the other inmates and placed plaintiff at risk. Dkt. No. 33, Ex. A. The plaintiff had a hearing and was found guilty of tampering with the vending machine. *Id.* Additionally, plaintiff had angered other inmates in his unit through other actions as well, and his life was threatened. Dkt. No. 33, Ex. B. RJC Classification Specialist Ron Kintner therefore moved plaintiff to protective custody. *Id.* Contemporaneous classification notes confirm that plaintiff was moved "for his own safety" and not in retaliation to his filing of a grievance. *Id.*, Ex. B. Plaintiff's complaint even indicates that, when Sergeant Jones moved him, he stated that "it was for [his] own protection." Dkt. No. 12. Defendants could have believed, with justification, that moving plaintiff to administrative segregation for his own safety was a reasonable response. They are therefore entitled to qualified immunity as to this claim as well.

CONCLUSION

Defendants' motion to dismiss should be granted as to defendant Captain Woodbury and Sergeant Jones because plaintiff has failed to demonstrate that either of them personally participated in violating his civil rights. Additionally, defendants' motion for summary judgment should be granted as to Officer Ngo because the use of a racial slur does not rise to the level of a constitutional violation. Finally, Officers Ngo and Jones are entitled to qualified immunity on plaintiff's claims regarding "rack backs" and segregation. Plaintiff's complaint should be dismissed. A proposed order accompanies this Report and Recommendation.

DATED this 7th day of September, 2005.

James P. Donohue

JAMES P. DONOHUE
United States Magistrate Judge